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A REAPPRAISAL OF THE GRAND JURY CONCEPT

SEYMOUR GELBER

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This article examines several modern expansions of the traditional Grand Jury procedure, particularly the use of Special Grand Juries and Special Counsel. These relatively little-used innovations provide means for bypassing the local prosecutor, which may be necessary for effective investigation of government corruption. The author concludes his survey of increased Grand Jury flexibility with the observation that Grand Jury efficiency may be generally increased through use of Special Grand Juries and Special Counsel, and the *caveat* that even an optimum Grand Jury cannot be expected to assume the functions which properly are entrusted to the police and prosecution.

Many changes have been made in the operation of the Grand Jury since its common law ancestor came to this country via English colonists. Today, the accusatorial and inquisitorial roles of the Grand Jury have been both expanded and diffused by such new concepts as the Michigan one man judicial Grand Jury, Ombudsmen, Special Grand Juries, and Special Counsel.

The Michigan approach with authority centered completely in the judicial officer has been under constant attack since its inception in 1917.¹ Only in Connecticut has it ever had a counterpart, and there it was abolished in 1959.² The Ombudsman, a foreign import possessing both the glamour of distance and some success as a repository for citizens' complaints, is still in the evaluation stage. The use of Special Grand Juries and experimentation with Special Counsel are the most noticeable alterations. Their development is traceable in part to the desire to rid the Grand Jury of the influence exercised by the prosecutor, the court and any other governmental agency which may hamper its free movement.

Special Grand Juries may bypass the local prosecutor and are generally impaneled through the Attorney General or Governor for the specific purpose of investigating corruption in government. The appointment of Special Counsel also replaces the local prosecutor, but by vesting his authority in the Attorney General, the County

Attorney or a member of the Bar, it does not require the impaneling of a separate Grand Jury.

While Special Grand Juries have found some acceptance, there has been only a cautious response to the installing of Special Counsel in place of the historic advisory role filled by the duly elected prosecutor. In Dade County (Miami) Florida, under provisions of a Special Act³ and the cooperation of the State Attorney, the ultimate has been reached. There the Grand Jury selects Special Counsel from among members of the Bar, and the State Attorney appoints him an Assistant to lawfully interrogate witnesses before the Grand Jury and sign indictments. Although nominally an Assistant State Attorney, he serves at the desire and direction of each Grand Jury and is responsive to it rather than to the State Attorney. The result is a Grand Jury unfettered by any governmental influence whatsoever.

Whatever the value of the form of Special Counsel in Dade County, its development into an independent entity is of significance in relation to the experience of other jurisdictions. In no other state is authority to select Special Counsel to supplant the prosecuting attorney vested solely in the Jury. The usual remedy is to balance the prosecutor's influence by placing similar weight in another governmental officer, such as the Attorney General, the Governor, or the Court.

Some states have directly approached the powers developed for Special Counsel in Dade County,

¹ See SCIGLIANO, ONE MAN GRAND JURY (Gov't Research Bureau, Mich. State Univ. 1957).

² CONN. GEN. STAT. Ch. 51, §§111 & 126 (repealed 1959).

³ FLA. LAWS, General Acts, Ch. 57-870, Acts of 1957, §4: "The grand jury may employ an attorney as special legal counsel for the grand jury who shall furnish legal advice and services to the grand jury."

Florida. However, there appears to be little experience in terms of court tests to determine the impact of this system. California's *Code of Criminal Procedure* allows the Attorney General to select Special Counsel at the request of a Grand Jury⁴ or when the district attorney is being investigated.⁵ Inasmuch as a "true bill" need only be signed by the foreman in California, this results in Special Counsel having all the authority of the District Attorney.⁶ It should be noted that while the Grand Jury must request Special Counsel, it is the Attorney General who makes the selection.

The Nevada statute specifically permits Special Counsel but appears to confine him to investigative and legal aid.⁷ In our newest state, Hawaii, provision exists for Special Counsel, but his activity is controlled by the Public Prosecutor.⁸

The statutes and cases show a determination to require that stringent controls be exercised on any outside legal advisors to the Grand Jury. Only in Dade County, Florida, with the cooperation of the State Attorney, can a Special Counsel effectively bypass all the duly constituted elected officials and operate totally free of governmental influence. While unrestrained authority may lead to abuse, its course also encourages positive action. How best can sufficient means be made available for Grand Juries to overcome the political and personal restraints inherent in prosecuting officials? Is the specially appointed advisor out to "get" indictments with no concern for the rights of the accused? The answer lies in providing adequate flexibility so that Juries have options among the choice of advisors and creating machinery so that no matter the option, sufficient recourse to other governmental agencies is had by an accused. The Florida option is limited to the Governor sending in a prosecutor from another Circuit to replace the locally elected advisor.⁹ This can cause considerable dislocation and be effective only if used sparingly and for short term matters. One of the alternatives offered is the use of Special Grand Juries, emanating from a state level and usually under authority of the Governor or the State Attorney General. Local prosecutors continue to oversee their Grand

Juries, but another Grand Jury is superimposed over acts and conduct which they may more ably pursue.

The most dramatic recent use of the impaneling of Special Grand Juries occurred in Massachusetts in 1964. In that State a statute permits the Attorney General to impanel a Special Grand Jury by written request showing public necessity.¹⁰ The then Attorney General Edward R. Brooke used the findings of a crime commission financed by the State with \$564,000 as the investigative arm of the Special Grand Jury. Over five hundred indictments were obtained ranging from bribery, larceny, and perjury, to conflict of interest. Involved were a former Governor, two former Speakers of the State House of Representatives, a large number of legislators, a former supervisor of the state police, and a number of department heads in the State government. Many convictions were obtained and from it rose legislative programs to counteract corruptive influences in government. The investigation, indictment and trials ran through a period of two years and any objective appraisal would have to commend the efforts and results of this striking campaign for good government. Yet there are its detractors. Objection centered about the indictment and trial of Foster Furcolo, former Governor of Massachusetts, charged with conspiracy to arrange a bribe. The trial judge directed a verdict of not guilty and scathing press comments followed.¹¹

Former Governor Furcolo, in a statement placed in the *Congressional Record*,¹² recommended that a monitor be appointed by the court who would be available for advice to the Grand Jury and the court as to any excesses committed or planned in the jury room. According to Furcolo, the monitor would have no authority other than providing a neutral, impartial observer to offset abuses or irregularities attempted by the prosecutor.

It is of interest to note that the creation of Special state Grand Juries aimed at diluting the local prosecutor's domination is here subject to similar attack. Who can vouch that a "monitor"

¹⁰ MASS. GEN. LAWS Ch. 277-2(A).

¹¹ Boston Post Gazette, Oct. 11, 1965: "The fact that not a scintilla of proof was presented to the trial jury of any form of wrongdoing by Furcolo makes it impossible to understand why he was indicted."

Lawrence Sunday Sun, Oct. 3, 1965: "As matters now stand, it looks to us like the attorney general acted pretty irresponsibly in bringing Furcolo to trial."

¹² CONG. REC., October 21, (1965) (remarks of Congressman Edward P. Boland, Mass.).

⁴ CAL. CODE CRIM. PROC. §936.

⁵ *Id.* §925.

⁶ *Id.* §940.

⁷ NEV. REV. STAT. Ch. 172.320(4).

⁸ HAWAII REV. LAWS Ch. 144.72.

⁹ FLA. STAT. Ch. 27.15.

could not develop into the same unchecked superstructure of which Furcolo complains?

California invests considerable power in the Attorney General who, when he considers it in the public interest, may convene a Grand Jury and submit criminal matters to it with the full authority possessed by the District Attorney.¹³ He may also demand that a Grand Jury be impaneled by those charged with duty to so do in event one is not in session.¹⁴ Michigan's unique approach¹⁵ allows the Attorney General to call for a Grand Jury; but with a single judge constituting the Grand Jury, there is little issue as to the Prosecuting Attorney or the Attorney General thwarting the investigation. The Michigan system has overcome the problem of excess authority in the prosecutor, but, by placing it in the hands of a judge, it merely transfers the potential imbalance.

The State of New York lodges extraordinary authority in the Governor. In the public interest, he may call one or more special terms of court and designate a judge to draw a panel which is subject to the same provisions of the Grand Jury law as those regularly sitting.¹⁶ This applies only in New York City and not statewide.

The New York experience can best be told in recounting the events surrounding Thomas E. Dewey's legendary war on crime during the 1930's. Dewey succeeded in indicting and convicting the vice lords of that day who, by their racket control, appeared to have exercised unwholesome influence in the business and political life of the community. An article in the November-December 1936 publication, *The Panel*, issued by the Grand Jury Association of New York County, described the background conflict leading to the selection of Dewey as a Special Prosecutor and the use of a Special Grand Jury.¹⁷ Lacking legal power to

replace the District Attorney, the Governor "persuaded" him to give full authority to Dewey. Dewey's success has since been cited by all defenders of the use of the Grand Jury in its extraordinary form.

Since the Dewey days, New York Grand Juries, special and regular, have unearthed official misconduct and criminal syndicate operation, although none as encompassing or dramatic as the Dewey action. In addition, New York now has provision for a Governor's State Commission of Investigation¹⁸ which operates independently of regular law enforcement channels or Grand Juries.

The use of Special Grand Juries emanating from a state level, via the Governor, Attorney General, or legislature, reflects an effort to create a more adequate check and balance on local grand juries. In some instances, the authority for such action is implied rather than statutory, and in several states investigating facilities to control local crime have been created to bypass Grand Juries. Despite the impact of Grand Juries, little study has been made of their functional uses and development.

CONCLUSION

New procedures in the administration of the Grand Jury show a direction, if not a trend, toward obtaining greater flexibility in its operation. The conservative manner in which the prosecutor has led this citizens' group has caused observers to conclude that Grand Juries are not functioning at maximum efficiency. The advent of syndicated crime, travelling through county and state lines, calls for new and dynamic defenses, which responsibility some regard as peculiarly suited to a

¹³ CAL. CODE CRIM. PROC. §923.

¹⁴ *Id.* §913.

¹⁵ MICH. PUB. ACT No. 276 (1951).

¹⁶ N. Y. JUDICIARY LAW §149.

¹⁷ *THE PANEL* (Publication of the New York Grand Jury Association, November-December 1936):

"At that time there was much loose talk of a bail-bond combine, the numbers racket, prostitution, and of various other rackets spreading throughout New York City and its environs. These reports interested the March Grand Jury and an effort was made to get authentic information. District Attorney Dodge assigned two men from his office to assist the Grand Jury, but little was actually accomplished. The Grand Jury was conscious of conditions and dissatisfied with this lack of progress. It saw the job as one that required the virtual

supersession of Mr. Dodge and his staff by a special prosecutor of outstanding ability, vigor, and prestige, and accordingly called upon the District Attorney to appoint such a man from a list of six names selected after mature deliberation with the acknowledged leaders of the New York Bar. Mr. Dodge refused. The Grand Jury, feeling that its usefulness as a Grand Jury had come to an end, asked to be discharged, and at the same time petitioned Governor Lehman to appoint a special prosecutor to succeed Mr. Dodge. Mr. Dewey was selected, given all the powers of the District Attorney himself, an independent staff of lawyers, investigators, and accountants to be personally selected by him, and charged to prosecute, with the aid of an extraordinary Grand Jury impanelled under Justice Philip J. McCook, organized crime, organized vice, racketeering, and their connection with politics and the agencies of law enforcement."

¹⁸ N.Y. UNCONSOL. LAWS ch. 989, §7051 (1958).

mobile, aggressive jury. The intricate schemes involving complex corporate endeavors may require special techniques also best adapted to Grand Juries. The massive thrust of violent crime in the community and the greater awareness of it in each citizen perhaps portends a need for direct citizen involvement through a Grand Jury. All of these call for the creation of a responsive Grand Jury and the removal of impediments, be they inertia, ineptness or indifference.

The need for additional sources of Grand Jury counsel to create a more sensitive balance has been considered in several states. The precarious relationship involved in such changes has been met by vesting selection authority in the Court or the Attorney General. Lacking this, the result is a citizen body led by a private attorney exercising power without responsibility to the electorate or the accused. The unharnessed Special Counsel has been likened to the Lone Ranger. An unknown masked man rides into town on a white horse, representing virtue. In his own manner, he disposes of evil and then rides away into the setting sun. A voice inquires, "Who is that?" The answer is given in an awestruck tone, "That's the Lone Ranger." Even virtue in combat with evil demands an accountability. The system requires controls rooted in the orderly, regular processes of government.

Although not used or suggested as an alternative to Special Counsel, the Special Grand Jury has

found greater general acceptance. Its need is determined by an agency of government; the Court, the Attorney General, or sometimes the Governor. It responds to the emergency situation and offers the necessary flexibility. The danger areas are considerably diminished in that control is exercised by bodies directly responsible to the electorate.

Maintaining the Grand Jury system as a vital part of the community is a significant goal. The variety of direction that has been taken in Michigan, California, and Connecticut, among others, bodes well for its future. Only this kind of experimentation will keep it alive and functional. New approaches are special only in the sense that they are adjustments to today's needs rather than perpetuation of yesterday's standards. The basic realization that must be accepted is the recognition that a Grand Jury is not a law enforcement agency. It cannot regularly do what is the function of police and prosecutor. Fighting organized crime is the day to day full time duty of professionally trained law enforcers. A Grand Jury may temporarily buttress law enforcement and ferret out the cause of its failings, but it cannot replace the policing institutions. A thorough understanding of our total law enforcement structure, its potential and performance, can best place the role of the Grand Jury in proper perspective.